United States Department of Labor
Board of Alien Labor Certification Appeals
Washington, D.C. 20001

Date: August 25, 1997

Case No. 96 INA 0077

In the Matter of:

CRESTON ASSOCIATES, LTD.
Employer

on behalf of

ROBERTA BONGIANINO
Alien

Appearance: J. G. Parilla, Esq., of New York, New York

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of Roberta Bongianino (Alien) by Creston Associates, Ltd., (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182 (a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U. S. Department of Labor at New York, New York, denied this application, the Employer and Alien requested review pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor (Secretary) has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and avail-

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

able at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U. S. workers similarly employed. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U. S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U. S. worker availability.[2]

STATEMENT OF THE CASE

Employer, Creston Associates, Ltd., filed an application for labor certification on behalf of the above-named alien for the position of Creative Director (European Markets). AF 33. Employer offered $800.00 per week for this position which required 40 hours a week. Employer required four years of high school education with two years of training in art and design plus two years of experience in the job offered. The job duties were described as follows:

> determine creative objective and then produce creative image; oversee and produce initial sketch through finished printed product for European Market Clientele.

In addition, Employer required an applicant to submit portfolio samples, including five non-returnable, published samples. (Three samples must show European work.) In addition, Employer listed other special requirements as follows:

> Utilized Macintosh software, traditional board skills, proficient in photoshop illustrator. Freehand, Mac Paint, Quark-Xpress, Quickeys, Norton Utilities, Now Utilities, knowledge of how to manage the system removable hard drivers. In depth experience in European consumer markets, supermarket distribution, specialty store distribution, department store distribution, automotive aftermarket and computer supplies market

AF 33.

Notice of Findings. The Certifying Officer (CO) issued a Notice of Findings (NOF) on July 14, 1995, in which certification was denied, subject to rebuttal. AF 80 . The primary reason for denial was the business necessity of the special requirements

---

[2]Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

listed by the Employer. Supra. The CO said the Employer declined to provide a business necessity for these requirements in a letter dated September 12, 1994, in which the Employer said it listed the requirements under "special requirements" at the suggestion of the New York state labor department. The Employer contended in its letter that it initially listed such skills as job duties because they were needed in the normal course of business. The Employer argued that it was not necessary to establish a business necessity for these requirements for this reason. AF 57. In the NOF, the CO stated that absent an explanation and documentation, the special requirements were excessive, restrictive and appeared tailored to the Alien. For these reasons, the CO directed in its rebuttal the Employer must amend the special requirements to eliminate these job requirements or, in the alternative, to demonstrate how each of the requirements arises from Employer's business necessity.[3] The CO then stated seven issues that the Employer's documentation and evidence must address in proving business necessity:

> (1) Define and document relationship and business necessity of each special requirement to the job opportunity and to the other special requirements.
> (2) Include projections on which these special skills will be used and the percentage of time spent on each.
> (3) Document that it is normal for the employer and/or for your industry to require all of the skills listed in one person. Provide evidence, i.e. personnel manuals, previous classified ads, etc.
> (4) List the number of current and past employees who possess all of the skills and that all of the skills are required for all individuals hired for this same position.
>
> (5) Which are core to the job without which an otherwise qualified employee would not be able to perform the job duties. Which are substitutable.
> (6) Identify which are customarily gained by someone who has two years experience as a Creative (Art) Director.
> (7) Identify which are customarily learned on the job as is normal of any newly hired employee.

AF 78-80.

Rebuttal. Employer's rebuttal of August 15, 1995, included a statement by Employer that the job title and duties, including those listed as special requirements, are common to the industry. AF 87. Employer again noted these special requirements were

---

[3]The CO said, "To establish business necessity under [20 CFR §]656.21(b)(2)(i) an employer must demonstrate that the job requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform the job in a reasonable manner."

initially included in the job duties section, but moved to the special requirements section at the request of the department of labor. Employer stated further the job duties as listed in both places are not restrictive nor were they requirements a qualified person in the United States could not match. In addition, Employer said the requirements listed as special requirements were not special but were the normal skills required in the industry and in this Office.

As part of its proof of business necessity the Employer submitted a letter from Joanne Manna, a professor at the Fashion Institute of Technology, who stated the job duties listed in item 14 are normal in the industry. She said the special requirements listed in item 15 are common interview requirements and specifications to the industry. She explained that it is standard to review numerous portfolio samples in appraising a job applicant's capabilities. AF-84.

Employer also submitted a letter by Norma Vavolizza, who is president of NV Communications and is a board member of the League of Advertising Agencies. Ms. Vavolizza said the job duties in item 13 are common customary and essential for the position of Creative Director working in an U.S. agency. In addition, she said sections 14 and 15 encompass normal minimum industry requirements of education and experience. Ms. Vavolizza added that it is a normal industry practice to review several portfolio samples, including at least five published samples that are non-returnable. Finally, Ms. Vavolizza said it is normal to require that a Creative Director be proficient in traditional "board skills," as well as in the Macintosh computer and related software, as "today everything is computerized." AF 82.

Final Determination. On August 24, 1995, the CO's Final Determination denied certification. AF 90. Noting the evidence Employer submitted on rebuttal, the CO was not persuaded by the Employer's assertions or the letters by Ms. Manna and Ms. Vavolizza. The CO did not credit Ms. Manna as an expert regarding the normal customs in the advertising industry, as her background was in fashion and not in the advertising industry.

The CO said that the letter from Ms. Vavolizza appeared to be an expert opinion, but noted that her letter did not address the requirements in section 15 of Form ETA 750A except to say the requirement that a job applicant submit portfolio samples, five non-returnable published samples, and show proficiency in using the Macintosh computer and related software computer programs were normal to the job opportunity. The CO said that, while this letter supported submission of portfolio samples and some computer skills, it failed to answer the questions posed in the NOF. The CO said the Employer's letter was also non-responsive. The CO explained that none of the software packages were defined, no projects on which these special skills are used were

described, and the Employer failed to identify current or past employees who were experienced in all of these skills before they were hired, and the rebuttal failed to explained how the Norton Utilities, a debugging program, relates to hiring a worker for this job opportunity.

The CO then found that the rebuttal had failed to show which skills are essential to the job, which skills could be replaced by substitute skills, and which skills could be acquired either on this job or by working as a Creative Arts Director. The CO observed that the burden of demonstrating that the job requirements are commonly and customarily demanded at the time of hiring and that they are not restrictive is on the employer. The CO denied this application for labor certification because Employer failed to sustain its burden of proof. AF 90.

Appeal. The Employer requested administrative review on September 27, 1995. AF 152. As part of its appeal the Employer submitted an additional statement by its President discussing in great detail the job requirements and their relationship to the job opportunity. At this point the Employer also submitted new letters from Ms. Manna and Ms. Vavolizza. Finally, with its request for review the Employer submitted three samples of work products requiring the skills at issue. AF 152.

DISCUSSION

20 CFR § 656.21(b)(2)(i)(A) requires the employer to prove that an employer's the requirements for the position are normally required for the performance of that job in the United States unless those requirement are shown to have arisen from employer's business necessity. Also, 20 CFR § 656.2 quotes § 291[4] of the Act as follows:

> Whenever any person makes application for a visa or any other document required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act.

It follows that the Employer in this case was required to bear the burden of demonstrating that its job requirements for this

[4]Codified as 8 U.S.C. § 1361. This is consistent with the mandate of the Administrative Procedure Act at 5 U.S.C. § 556(d). Moreover, the legislative history of the 1965 amendments to the Act establishes that Congress intended that the burden of proof for obtaining labor certification be on the employer who seeks an alien's entry for permanent employment. See U.S. Rep. No. 748, 89th Cong., 1st Sess., reprinted in 1965 U.S. Code Cong. & Ad. News 3333-3334.

position are normally required for the performance of the job in the United States.[5]

The CO's rejection of the special requirements in item 15 of ETA 750A but not the special requirements in item 14 indicates that the CO found that the Employer met its burden of proof on demonstrating that the elements in item 14 were normally required to perform the work of this position in the United States. The Employer was repeatedly given reasonable notice that its claim that the added job requirements in section 15 were normally required for the performance of the job in the United States were not acceptable. Those explicit warnings were (1) the request by the New York State Department of Labor that Employer list certain requirements in the "special requirements" section of item 15; (2) the letters requesting additional documentation for those requirements; and (3) the CO's findings in the NOF. The Employer nevertheless failed to demonstrate that its job requirements were skills that normally were required of workers assigned to perform the duties of this position in the United States, even though the Employer was clearly notified that their business necessity must be proven.

Employer's mere assertion that the requirements are normally required in this industry is not sufficient to establish that the job requirement is ordinarily required for this job in the United States. **Tri-P's Corp.**, 87 INA 686(Feb. 17, 1989). Alien Labor certification was properly denied where an employer failed to prove the business necessity of its special requirements for an accountant position with the documentation reasonably requested by the CO. In **Kulmer, Inc.**, 93 INA 235(Apr. 13, 1995), the Employer failed to comply with the CO's request for specific documentation that included the number of such accountants it had employed. Instead, the Employer simply offered its assertion that, "[I]t would be safe to say that they [the questioned special requirements] are in common usage in a wide variety of industries and field and are by no means unique to our organization."

In this proceeding this Employer asserted that its job requirements are common to the advertising industry instead of submitting the specific documentation explicitly requested by the CO, as discussed above. Although this Employer submitted two letters as evidence, the CO has noted that the letter from Ms. Manna did not include any information that established her qualifications as an expert in the position at issue, since her putative status as a "professor of advertising" was not included

[5]Although the panel is aware that the computer programs listed in the special requirements are programs that can be learned quickly with minimal in-house training, this consideration was not given any weight in determining this appeal.

in the rebuttal evidence. As the first evidence suggesting that she had any expertise was not submitted until it was received as part of Employer's request for review, it cannot be considered in these proceedings. **Memorial Granite**, 94 INA 066(Dec. 23, 1994), and see infra. In addition, as the CO noted in the Final Determination, even though the letter from Ms. Vavolizza said she was president of an advertising company and asserted the expertise of this position, her letter did not address all of the questions in the NOF, and it only supported part of the requirements rejected by the CO's NOF.

In response to the Final Determination and in its request for review, the Employer now has submitted a more extensive discussion of the position at issue and its job requirements. In addition, the Employer finally submitted samples of the projects requiring such job duties together with additional letters from Ms. Manna and Ms. Vavolizza, as noted above. None of the evidence Employer submitted with its request for review is part of the Appellate File, and as a consequence it cannot be considered on appeal. 20 CFR § 656.27(c); and see **Memorial Granite**, supra.

Notwithstanding the Employer's contention on appeal that it cannot imagine how it could further clarify its application, the record indicates that the NOF clearly advised the Employer of the issues that challenged its job requirements and told it exactly the evidence that the CO required as proof of business necessity. The Employer failed to meet its burden of proof when it chose to present no more than the broad assertion that the skills it required were normal to this position instead of the evidence that the CO said was required to establish that the Employer's job requirements were normal to the job opportunity. As noted above, Employer's reliance on its assertion that such duties were normal instead of presenting the evidence that the CO specified was not sufficient to establish that its job requirements were either normal for the position or required by business necessity.[6]

It follows that the Employer neither proved that the job requirements challenged by the CO are normal to the job opportunity, nor established the business necessity of the requirements. For these reasons we conclude that the CO properly denied certification since the position included job requirements that the Employer neither demonstrated to be normal to the position nor proved to arise from business necessity.

Accordingly, the following order will enter.

---

[6]It is self-evident that the Employer could have submitted earlier in these proceedings the more explicit documentation it offered with its request for review.

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the Panel:

_____
FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

Sheila Smith, Legal Technician

BALCA VOTE SHEET

Case No. 96 INA 0077

CRESTON ASSOCIATES, LTD., Employer
ROBERTA BONGIANINO, Alien

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			
Huddleston			

Thank you,

Judge Neusner

Date: August 6, 1997